UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/645,889	08/20/2003	Michael P. Coppert	1GT1P319/AC046	8185

22434 7590 05/29/2008	EXAMINER
BEYER WEAVER LLP	FRANCIS, MARK P
P.O. BOX 70250	
OAKLAND, CA 94612-0250	

ART UNIT	PAPER NUMBER
2193	

MAIL DATE	DELIVERY MODE
05/29/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

	Application No.	Applicant(s)
Office Action Summary	10/645,889	COPPERT, MICHAEL P.
	Examiner	Art Unit
	MARK P. FRANCIS	2193

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE <u>3</u> MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
  Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on <u>04 March 2008</u>.
2a)☐ This action is **FINAL**.   2b)☒ This action is non-final.
3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) <u>8,10-18,24,25,27-33,39,40 and 42-48</u> is/are pending in the application.
    4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5)☐ Claim(s) _____ is/are allowed.
6)☒ Claim(s) <u>8,10-18,24,25,27-33,39,40 and 42-48</u> is/are rejected.
7)☐ Claim(s) _____ is/are objected to.
8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.
10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.
    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
    a)☐ All   b)☐ Some * c)☐ None of:
      1.☐ Certified copies of the priority documents have been received.
      2.☐ Certified copies of the priority documents have been received in Application No. _____.
      3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1)☐ Notice of References Cited (PTO-892)
2)☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3)☒ Information Disclosure Statement(s) (PTO/SB/08)
    Paper No(s)/Mail Date <u>05/01/08</u>.
4)☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____ .
5)☐ Notice of Informal Patent Application
6)☐ Other: _____ .

Continued Examination Under 37 CFR 1.114

1.   A request for continued examination under 37 CFR 1.114, including the fee set

forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this

application is eligible for continued examination under 37 CFR 1.114, and the fee set

forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action

has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on March

04, 2008 has been entered.

2.   Per applicants' request, claims 8,10 ,13-14,18, 24-33, and 39-48 have been

amended.

Claim Rejections - 35 USC § 101

3.   35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of
> matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the
> conditions and requirements of this title.

4.   Claims 8, and 10-12 are rejected under 35 U.S.C. 101 because the claimed

invention is directed to non-statutory subject matter.

        With respect to claim 8, this claim recites a monitoring apparatus that comprises

of a message receiver at a central server(*software*) that receives a first message from a

remote first site, a tester at the central server(*software*) that determines if the value

received in the first message is acceptable, and an alerter(*software*) at the central

server that provides alerts if the value is not acceptable. Although Applicant defines

functional descriptive material, Applicant has not disclosed the functional descriptive

material being embodied on computer readable media or being executed by a

processor or some form of hardware. Thus, all of steps of claim 8 can be implemented

using software means only (i.e. computer programs per se) that does not require the

use of hardware to execute on.

As a suggestion, Applicant could add the phrase, "a processor" to the body of the

independent claim to overcome 101 rejection.

Claim Rejections - 35 USC § 102

5.		The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the

rejections under this section made in this Office action:

6.		A person shall be entitled to a patent unless –

> (e) the invention was described in (1) an application for patent, published under section 122(b), by
> another filed in the United States before the invention by the applicant for patent or (2) a patent
> granted on an application for patent by another filed in the United States before the invention by the
> applicant for patent, except that an international application filed under the treaty defined in section
> 351(a) shall have the effects for purposes of this subsection of an application filed in the United States
> only if the international application designated the United States and was published under Article 21(2)
> of such treaty in the English language.

7.   Claims 8,10-18, 24-33, and 39-48 are rejected under 35 U.S.C. 102(e) as being

anticipated by Luzzi. (U.S. Pat 6,321,263)

Independent claims

With respect to claims 8 and 13, Luzzi discloses a system for monitoring software,

comprising:

a central computer;(Col 12:5-15, "…a remote central repository…")

 a monitoring apparatus installed in the central computer;(Col 15:15-25, "…a monitored

application program…"), wherein the monitoring apparatus includes a message receiver

to receive a first message from a first site remote from the central computer,(Col 14:10-

17, "…the timer mechanism…on the initial service request…") the first message

including a first value for a first metric,(Col 14:19-25, "…availability and response time

are key metrics…") a tester to determine if the first value is acceptable,(Col 14:64-67,

"…the probe 201 further performs threshold comparison operations…")

 and an alerter configured to provide an alert if the first value is not acceptable; (Col

15:1-10, "…an alert signal is generated…")

 a first computer at the first site;(Col 9:59-67, "…a session with the server computer) a

first probe installed in the first computer; (Col 9:59-67, "…the services of the application

program…")

and a network connecting the central computer and the first computer. (Col 12:10-16,

"…and remote on the network…")

With respect to claim 24 and 39, Luzzi discloses a Computer-readable storage media containing a program to use a monitoring apparatus, the program comprising: (Col 15:5-20, "…AMA probe…")

Software at a server to receive a message; (Col 14:10-17, "…the timer mechanism…on the initial service request…")

Software at the server to determine a first value for a first metric for a first site from the message;(Col 11:20-35, "…have exceeded such pre-defined performance criteria…") software to determine a first value for the first metric for a site from the message; (Col 12:28-40, "…signaling the violation of pre-defined performance criteria…")

software at the server to determine if the first value for the first metric for the first site is acceptable;(Col 11:28-35, "…A determination that one of these pre-defined performance criteria has been violated…")

and

if the first value for the first metric is not acceptable,(Col 14:64-67, "…the interface-based predetermined performance criteria have been violated…") software to display an alert that the first value for the first metric is not acceptable.(Col 12:35-43, "…an alert signal will be generated by the AMA probe and forwarded to the alerting mechanism…")

Dependent claims

With respect to claim 28, the rejection of claim 13 is incorporated and further, Luzzi discloses that determining if the first value for the first metric is acceptable includes determining if the first value for the first metric is within a range of acceptable values.

(Col 11:14-30, "…pre-defined performance criteria may include such metrics as

maximum….")

With respect to claim 10, the rejection of claim 8 is incorporated and further, Luzzi

discloses that the tester includes: a plurality of filters, each filter determining a range of

acceptable values for a metric; (Col 11:14-34, "…the pre-defined performance

criteria…")

and a selector to select the first filter from the plurality of filters based on the first metric

in the first message. (Col 11:14-30, "…pre-defined performance criteria may include

such metrics as maximum….")

With respect to claim 11, the rejection of claim 10 is incorporated and further, Luzzi

discloses that: the plurality of filters includes at least one filter defining a range of

acceptable values for the first metric associated with a site; (Col 11:14-30, "…pre-

defined performance criteria may include such metrics as maximum….")

and a selector to select the first filter from the plurality of filters based on a first site in

the first message. (Col 11:14-30, "…pre-defined performance criteria may include such

metrics as maximum….")

With respect to claim 12, the rejection of claim 8 is incorporated and further, Luzzi

discloses comprising a log, the log including an entry corresponding to the first

message. (Col 12: 28-35, "…signaling the violation…")

With respect to claim 14, the rejection of claim 13 is incorporated and further, Luzzi

discloses the system further comprises: a second computer; (Col 12:1-15, "…on the

server computer…")

and a second probe installed in the second computer; (Col 12:1-15, "…including the

AMA probe…")

and the network connects the central computer and the second computer. (Col 12:1-15,

"…and remote on the network…")

With respect to claim 15, the rejection of claim 13 is incorporated and further, Luzzi

discloses that the first computer includes a software package; (Col 10:5-15, "…by

monitoring an application program…")and the first probe monitors the software

package. (Col 15:5-20, "…AMA probe software…to a monitored application program…")

With respect to claim 16, the rejection of claim 13 is incorporated and further, Luzzi

discloses that the first computer includes a database; (Col 12:10-20, "…central

repository…")and the first probe monitors the database. (Col 12:16-27, "…an multiple

monitoring implementation,…")

With respect to claim 17, the rejection of claim 13 is incorporated and further, Luzzi

discloses that:

and the probe includes: a first sensor to capture a first value for a first metric; **(Col**

12:28-40, "…signaling the violation of pre-defined performance criteria…")

and a message generator operative to send a first message to a central site, the

message including the first value. (Col 12:60-67, "…an application availability-based

alert signal…")

With respect to claim 18, the rejection of claim 13 is incorporated and further, Luzzi

discloses that the first computer includes an e-mail server to generate a message from

the first probe to the monitoring apparatus. (Col 11:45-55, "…the network address of the

target server…")

With respect to claim 25, the rejection of claim 24 is incorporated respectively and

further, Luzzi discloses comprising, if the first value for the first metric is acceptable,

logging the first value for the first metric. (Col 4:35-45, "…program metrics…")

With respect to claims 27 and 42, the rejection of claims 24 and 39 are incorporated

respectively and further, Luzzi discloses that determining if the first value for the first

metric is acceptable includes comparing the first value for the first metric with at least

one acceptable value. (Col 11:14-30, "…pre-defined performance criteria may include

such metrics as maximum….")

With respect to claims 28 and 43, the rejection of claims 24 and 39 are incorporated

respectively and further, Luzzi discloses that the software to determine if the first value

for the first metric is acceptable includes software to determine if the first value for the

first metric is within a range of acceptable values. (Col 11:1-28, "…A determination that

one of these…")

With respect to claim 29, the rejection of claims 24 is incorporated and further, Luzzi

discloses that receiving a message includes: accessing the first value for the first metric

by a probe; (Col 18:15-25, "…for accessing data stored in the repository…")

generating the message by the probe; (Col 11:28-40, "…to generate an alert signal…")

and sending the message to the monitoring apparatus by the probe. (Col 15:5-20, "…to

a monitored application program…")

With respect to claims 30 and 45 the rejection of claims 29 and 44 are incorporated

respectively and further, Luzzi discloses that sending the message includes: delivering

the message to an e-mail server by the probe;(Col 18:15-25, "…the session established

between…")
delivering the message to the monitoring apparatus by the e-mail server. (Col 12:28-43,

"…an alert signal will be generated by the AMA probe…")

With respect to claims 31 and 46 the rejection of claims 29 and 44 are incorporated

respectively and further, Luzzi discloses that accessing the first value includes

accessing a software package by the probe. (Col 10:5-15, "...by monitoring an application program...")

With respect to claims 32 and 47 the rejection of claims 19 and 44 are incorporated respectively and further, Luzzi discloses that accessing the first value includes accessing a database by the probe. (Col 18:15-25, "...for accessing data stored in the repository...")

With respect to claims 33 and 48 the rejection of claims 29 and 44 are incorporated respectively and further, Luzzi discloses that generating a message further includes generating the message by the probe, the message including the first value for the first metric and an identifier for a site of the probe. (Col 11:28-40, "...to generate an alert signal...")

With respect to claim 40, the rejection of claims 39 is incorporated and further, Luzzi discloses if the first value for the first metric is acceptable, software to log the first value for the first metric. (Col 11:1-28, "...A determination that one of these...")

With respect to claim 42, the rejection of claims 39 is incorporated and further, Luzzi discloses that the software to determine if the first value for the first metric is acceptable includes software to compare the first value for the first metric with at least one acceptable value. (Col 11:15-35, "...The pre-defined performance criteria may

include…")

With respect to claim 44, the rejection of claims 39 is incorporated and further, Luzzi

discloses that the software to receive a message includes:

software to access the first value for the first metric by a probe; (Col 11:20-35, "…have

exceeded such pre-defined performance criteria…")

software to generate the message by the probe; (Col 12:28-40, "…signaling the

violation of pre-defined performance criteria…")and software to send the message to

the monitoring apparatus by the probe. (Col 11:28-40, "…to generate an alert signal…")

Response to Arguments

8.   Applicant's arguments filed on February 11, 2008 have been fully considered but

they are not persuasive. Following is the Examiner's response to Applicants' arguments.

With respect to claims 8,10-18, 24-33, and 39-48 Applicant essentially argues

that Luzzi et al. does not anticipate the features of this claim because Luzzi et al. does

not teach or suggest the features of receiving a message from a first site and sending

an alert message if the value in the message is not acceptable.

In response, the Examiner disagrees, Note Col 5:24-40, it is here that Luzzi

teaches that a set of parameters or probe configuration information are established at

the client computer in recording the performance of an application program. The client

computer probe(*central computer*) is configured to send service requests or messages

to the server computer(*first site*) to request the performance of the application services

by the application program that resides on the server computer that is different from the

client computer. In addition, the Examiner Notes Col 11:14-35, it is here that Luzzi

discloses that the AMA probe determines whether any pertinent elements of the

completed transaction including the service request and the corresponding response

have exceeded any such pre-defined criteria or guidelines and if so the AMA probe will

generate an alert signal that will be sent to the alerting mechanism. Therefore, Luzzi

does teach the features of receiving a message from a first site and sending an alert

message if the value in the message is not acceptable. See also col. 25, lines 4-55.

Regarding claim 8, Applicant essentially argues that Luzzi et al does not allow data to

be collected at one site and analyzed at a different location.

In reply, the Examiner disagrees, Note Col 12:15-30, it is here that Luzzi et al teaches

that the AMA probe, which is located at the central computer, may be instructed to

monitor multiple application programs either on the same or on different server

computers. In addition, the Examiner Note Col 11:14-35, it is here that Luzzi discloses

that the AMA probe determines or tests whether any relevant elements of the completed

transaction including the service response from the application program located on the

server computer has exceeded any predefined criteria and if so the AMA probe which is

located on a computer that is different from the server probe(e.g. See Fig. 2 element

203 APP PGM) will generate an alert signal to an alerting mechanism to signal a

violation of predefined criteria. See also col. 25, lines 4-55.

Conclusion

9.   The prior art made of record and not relied upon is considered pertinent to

applicant's disclosure.

10.   Any inquiry concerning this communication or earlier communications from the

examiner should be directed to MARK P. FRANCIS whose telephone number is

(571)272-7956. The examiner can normally be reached on Mon-Fri 8:00-4:30.

        If attempts to reach the examiner by telephone are unsuccessful, the examiner's

supervisor, Lewis Bullock can be reached on (571)272-3759. The fax phone number for

the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the

Patent Application Information Retrieval (PAIR) system. Status information for

published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see http://pair-direct.uspto.gov. Should

you have questions on access to the Private PAIR system, contact the Electronic

Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a

USPTO Customer Service Representative or access to the automated information

system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Mark P. Francis

Patent Examiner

Art Unit 2193

/Lewis A. Bullock, Jr./
Supervisory Patent Examiner, Art Unit 2193